SUPREME COURT, U. S.

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No. 932

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

LEONARD S. GOODMAN and BARBARA L. GOODMAN,
Petitioners,

v.

CHARLES J. FUTROVSKY, ET AL., *Respondents.*

PETITION FOR REHEARING

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On March 21, 1966, the Court entered an order denying the petition for a writ of certiorari filed in this case. The Chief Justice and Mr. Justice Black were of the opinion that certiorari should be granted. This petition respectfully requests the Court to rehear the petition for a writ of certiorari and upon such rehearing to grant certiorari.

The Delaware Supreme Court has held that petitioners and all other public shareholders of Giant Food,

Inc., a corporation operating some 70 supermarkets in the Washington—Baltimore area, may not complain that the officers and directors of the corporation are requiring it to purchase its produce requirements through a partnership composed of and profiting such officers and directors. The lower court rests its decision on the grounds that all stockholders (or their predecessors) waived objection to the arrangement, since they allegedly purchased their stock with actual notice of the arrangement. The lower court premises this alleged waiver solely on an erroneous construction that the Securities Act of 1933 required delivery of a prospectus containing notice of the arrangement to all prospective buyers of Giant's newly-issued public shares in 1959 before purchases were consummated.

We have urged that this Court should reverse this patently erroneous interpretation of the Securities Act, for in shielding the corporate officers and directors from suit, it causes the Act to work against the interests of new public investors and subsequent bona fide purchasers in a manner never intended by Congress. The holding will operate to encourage the smallest distribution of the prospectus, for it eliminates the need for proof that the prospectus was delivered which heretofore ensured a wide distribution of the prospectus. We have urged that no State court may lawfully make use of such an erroneous and harmful interpretation of Federal law for the purpose of effectuating local law. See *Standard Oil Co.* v. *Johnson*, 316 U.S. 481.

We believe we cannot overstress that the ruling below favors management and the securities industry against the interests of public investors flatly contrary to

the intent of Congress in enacting the Securities Act. As early as 1941, the Securities and Exchange Commission favored an amendment to the Securities Act under which a prospectus must be delivered before a dealer could offer to sell newly issued shares of stock.[1] The securities industry opposed the amendment and it was not adopted. The Delaware court, however, has construed the delivery requirement as if the amendment had been adopted, but not for the protection of investors as the Commission intended, but only to impose a waiver of stockholder rights while at the same time keeping intact the looser delivery requirements of the Act.

Moreover, the court below assumes, contrary to logic, that a mere legal requirement of delivery automatically means there has been delivery; the securities industry would have been satisfied in 1941 if Congress had enacted only a rebuttable presumption that the buyer had received a prospectus if the dealer or issuer could show "proof of the mailing of a general prospectus or of such a confirmation" of the stock sale.[2]

The ruling below is so arbitrary it could not withstand this Court's review even if it contained no express reliance upon the Securities Act. Thus, if this Court should hold, as it properly may, that the Securities Act does not require delivery of a prospectus to all prospective buyers, nor to anyone prior to effective sales, the lower court could not on remand lawfully

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[1] "Proposed Amendments to the Securities Act of 1933 and to the Securities Exchange Act of 1934," Hearings before the House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess., pp. 196, 328 (1941).

[2] *Id.* at 186.

say that solely for purposes of State law it will hold that a prospectus is delivered to all prospective buyers of new shares prior to their effectuating any purchases. In the absence of any law or evidence compelling that conclusion, any such ruling would be completely arbitrary and deprive petitioners of due process of law. Petitioners would be denied a fair hearing if subjected to such arbitrary or capricious power, *American Ry. Express* v. *Kentucky,* 273 U.S. 269, 273, whether the State acted through its legislative, executive, or judicial branches, *Brinkerhoff-Faris Co.* v. *Hill,* 281 U.S. 673, 680. Petitioners would be entitled to the judgment of this Court, if the lower court in this manner sought to deny due process to rights asserted under local law. Cf. *Demorest* v. *City Bank Co.,* 321 U.S. 36, 42.[3]

We submit that the Delaware court will not be able to avoid this Court's lawful interpretation of the Securities Act by couching its holding strictly in terms of local law. It was crucial to the decision below, in the absence of evidence, that it believed the Securities Act required all purchasers of new shares to receive a prospectus, in order to hold that the original purchasers of the public shares bought with actual knowledge of the arrangement between Giant and its management. If the lower court's view of the Securities Act is corrected by this Court, and since respondents failed to adduce any evidence in point, the lower court will

[3] A decision below depriving petitioners of their cause of action by imposing an arbitrary waiver would deprive petitioners of their property without due process of law as much as the State court's attempted deprivation of all existing remedies through the discovery of an allegedly exclusive remedy in *Brinkerhoff-Faris, supra,* or the arbitrary transferance of title through resuscitation of a dead cause of action spoken of by this Court in *Stewart* v. *Keyes,* 295 U.S. 403, 417.

be required to hold that there has been no waiver of stockholder rights to complain.

Petitioners respectfully renew their request that the Supreme Court give plenary consideration to the arbitrary construction of the Securities Act by the Delaware Court.

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